Supreme Court, U.S.
FILED

011660 MAY 8 2002

OFFICE OF THE CLERK

01-

In The

Supreme Court of the United States

STEVE SANDERS,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

On Petition for Writ of Certiorari To The
Arkansas Court of Appeals

PETITION FOR WRIT OF CERTIORARI

JOHN WESLEY HALL, JR.*
KATHY L. HALL
523 West Third Street
Little Rock, AR 72201
(501) 371-9131

May 2002

**Counsel of Record for Petitioner*

42 pp

QUESTION PRESENTED

Leon's third exception to applying the good faith exception should apply to an unconstitutional search warrant where the magistrate ratified the officer's unsupported conclusion that drugs would be found in defendant's house, after a search of defendant's car twenty-two miles away produced a small quantity of drugs, drug paraphernalia, and a handgun.

LIST OF PARTIES

All the parties to this case are listed on the cover in the style of the case.

TABLE OF CONTENTS

Question Presented i

List of Parties ii

Table of Contents iii

Table of Authorities v

Opinions Below 1

Jurisdiction 1

Constitutional Provision Involved 2

Statement 2

Reasons for Granting the Petition 4

I. THE COURT SHOULD GRANT CERTIORARI TO APPLY AND EXPLAIN THE THIRD *LEON* EXCEPTION TO THE GOOD FAITH EXCEPTION WHERE THE ACTION OF THE MAGISTRATE WAS A MERE RATIFICATION OF THE CONCLUSIONS OF THE OFFICERS. 4

A. Introduction and summary 4

B. The decision below is contrary to Leon and the cases it relied on for lack of probable cause 5

C. The application for the warrant lacked probable cause, as the Arkansas Court of Appeals held, but that court found a case to find the search still reasonable, although unconstitutional. 6

D. Just how unconstitutional was it? Does it matter that this Court has not spoken to the precise issue? 8

1. This was not a close question on probable cause; the officers were on notice this search lacked probable cause. 8
2. The officers had fair warning that this search was unconstitutional. 9
3. The decision below also conflicts with *Malley v. Briggs*. 10

E. The action of the magistrate should not breathe life into this unconstitutional search warrant. ... 11

II. APPLYING THE EXCLUSIONARY RULE TO THIS UNCONSTITUTIONAL SEARCH WILL SERVE THE DETERRENCE PURPOSES OF THE EXCLUSIONARY RULE. 12

Conclusion 13

Appendices 1a

Appendix A, *State of Arkansas v. Steve Sanders*, Newton County Circuit Court, No. CR99-47, Sept. 12, 2000 (filed Oct. 11, 2000) 2a
Appendix B, *Sanders v. State*, 76 Ark. App. 104, 61 S.W.3d 871 (2001) 19a
Appendix C, *Sanders v. State*, Ark.S.Ct., No. CR01-1425 (February 7, 2002), order denying petition for review 20a
Appendix D, *Sanders v. State*, Ark.S.Ct. No. CACR01-262 (April 4, 2002), order recalling mandate pending petition for certiorari for 90 days 21a

TABLE OF AUTHORITIES

CASES:

Aguilar v. Texas, 378 U.S. 108 (1963) 5, 6

Anderson v. Creighton, 483 U.S. 635 (1987) 9

Arizona v. Evans, 514 U.S. 1 (1995) 4, 12

Franks v. Delaware, 438 U.S. 154 (1978) 4

Giordenello v. United States, 357 U.S. 480 (1958) 5, 6

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 9

Illinois v. Gates, 462 U.S. 213 (1983) 5, 6, 8

Johnson v. United States, 333 U.S. 10 (1948) 8

Malley v. Briggs, 475 U.S. 335 (1986) 10, 11, 12

Massachusetts v. Sheppard, 468 U.S. 981 (1984) 4, 12

Miller v. Fenton, 474 U.S. 104 (1985) 5

Nathanson v. United States, 290 U.S. 41 (1933) 5, 6

Ornelas v. United States, 517 U.S. 690 (1996) 5

Sanders v. State, 76 Ark. App. 104, 61 S.W.3d 871 (2001) 1, 3, 7

Sanders v. State, Ark.S.Ct. No. CR01-1425 (Feb. 7, 2002) 1

United States v. Angulo-Lopez, 791 F.3d 1394 (9th Cir.1986) 7

United States v. Chadwick, 433 U.S. 1 (1977) 8

United States v. Lanier, 520 U.S. 259 (1997) 9

United States v. Leon, 468 U.S. 897 (1984) ..... *passim*

United States v. Pitts, 6 F.3d 1366 (9th Cir.1993) 7

United States v. Terry, 911 F.2d 272 (8th Cir.1990) 7

Whiteley v. Warden, 401 U.S. 560 (1971) 11

Yancey v. State, 345 Ark. 103, 44 S.W.3d 315 (2001) .. 7, 8

CONSTITUTIONAL PROVISIONS:

Fourth Amendment, U.S. Constitution ..... 1, 2, *passim*

STATUTES:

28 U.S.C. § 1257(a) 1

PETITION FOR WRIT OF CERTIORARI

Petitioner, Steve Sanders, respectfully petitions for a writ of certiorari to review the judgment of the Arkansas Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Arkansas Court of Appeals affirming petitioner's conviction is reported at 76 Ark. App. 104, 61 S.W.3d 871 (2001). (App. A, *infra*, at 2a-18a)

Petitioner timely filed a petition for review in the Arkansas Supreme Court which denied the petition for review on February 7, 2002. *Sanders v. State*, Ark.S.Ct. No. CR01-1425 (Feb. 7, 2002). (App. C, *infra*, at 19a) That court granted petitioner's motion to recall its mandate for 90 days to permit petitioner to file this petition for writ of certiorari on April 4, 2002. (App. D, *infra*, at 20a)

JURISDICTION

The Arkansas Court of Appeals decided the appeal in this case on December 5, 2001. (App. A, *infra*, at 2a) The Arkansas Supreme Court denied Sanders's petition for review on February 7, 2002. (App. C, *infra*, at 19a)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) involving final judgments of state courts and involving constitutional questions.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the U.S. Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the places to be searched and the persons or things to be seized.

STATEMENT

A. About 1 p.m., August 31, 1999, petitioner drove up a driveway off a county road in Newton County, Arkansas, and happened upon the execution of a search warrant for drugs at the residence of Sam Freeman. Petitioner was detained so he could be identified. The evidence conflicted at the suppression hearing, but the trial court found that petitioner was first allowed to leave after identifying himself and then consented to a search of his car when detained again.

Petitioner's car was searched. On the front seat, covered with a towel, officers found a cigar box containing 1/8th ounce of marijuana and four grams of methamphetamine. Under the seat they found a gray box containing a handgun.

Using the product of the car search, the Newton County drug officers contacted officers in petitioner's hometown, Harrison, Boone County, Arkansas, to conduct a search of petitioner's house. The Harrison officers procured a search warrant based on what was found in the car to search petitioner's house more than 22 miles from the car search.

The search of the house produced evidence used against petitioner at trial, admitted over his objection.

B. Petitioner was charged in Newton County Circuit Court with possession of drug paraphernalia (class D felony), possession of marijuana (class A misdemeanor), possession of methamphetamine (class C felony), and simultaneous possession of drugs and firearms (class Y felony).

Petitioner filed a motion to suppress the searches of his car and house which was heard, taken under advisement, briefed by the parties, and denied by the trial court.

Petitioner was tried before a jury. Evidence from the search of his house was admitted at trial. The jury convicted him of all counts, and the jury sentenced him as follows: Simultaneous possession of drugs and firearms, 10 years concurrent; possession of methamphetamine, 3 years concurrent; possession of drug paraphernalia, 3 years concurrent; possession of marijuana, $500 fine. His total sentence is 10 years.

C. Petitioner appealed his conviction to the Arkansas Court of Appeals, which affirmed. The Court of Appeals held that the search of petitioner's house was without probable cause and thus unconstitutional, but it held that the search was saved by the good faith exception, but without any explanation, other than citing to another Arkansas case. *Sanders v. State,* 76 Ark. App. 104, 61 S.W.3d 871 (2001). (App. A) That other case held that because some courts in a different federal circuit had differed on whether probable cause to search a drug dealer's car for drugs can extend to his house, the officers would be held to have acted in good faith here.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO APPLY AND EXPLAIN THE THIRD *LEON* EXCEPTION TO THE GOOD FAITH EXCEPTION WHERE THE ACTION OF THE MAGISTRATE WAS A MERE RATIFICATION OF THE CONCLUSIONS OF THE OFFICERS.

A. Introduction and summary

Since the good faith exception to the exclusionary rule was adopted nearly two decades ago in *United States v. Leon,* 468 U.S. 897 (1984), this Court has yet to explain the application of the five exceptions to the good faith exception that *Leon* recognized.[1] Only in *Arizona v. Evans,* 514 U.S. 1 (1995), has the Court sought to explain application of the good faith exception, there in the context of a court clerk's clerical mistake. *Evans* was more a case for whether the exclusionary rule should be applied to a judicial mistake, similar to *Massachusetts v. Sheppard,* 468 U.S. 981 (1984).

The appropriate development of the Fourth Amendment requires that this Court now undertake review and explanation of the third *Leon* exception: The affidavit did not provide the magistrate with a substantial basis for concluding there was probable cause in the place to be searched. Any reasonably well-trained officer had to be aware of the lack of probable cause, notwithstanding the fact the magistrate signed off on

---

[1] The five *Leon* exceptions are: (1) a *Franks* violation (*Franks v. Delaware,* 438 U.S. 154 (1978)); (2) the magistrate was not "neutral and detached"; (3) "reviewing courts will not defer to a warrant based on an affidavit that does not 'provide the magistrate with a substantial basis for determining the existence of probable cause'"; (4) the magistrate improperly assessed the totality of the circumstances; and (5) improper execution of the warrant. *Leon,* 468 U.S. at 914-15.

the warrant. Also, this case presents a fact situation quite similar to the hypothetical envisioned in *Leon,* 468 U.S. at 923 n. 24, where the officers with the "bare bones" facts get another officer in another county to get a warrant on their information.

Since *Leon,* the federal and state appellate courts have received virtually no guidance from this Court on when the exceptions to *Leon*'s good faith exception should apply, and this Court should grant review to settle this question in the interest of "maintain[ing] control of, and to clarify, the legal principles." *Ornelas v. United States,* 517 U.S. 690, 697 (1996) (bracketed material added), citing *Miller v. Fenton,* 474 U.S. 104, 114 (1985). Otherwise, the application of the good faith exception will remain adrift in the lower courts without guidance from this Court leading to judicial uncertainty from jurisdiction to jurisdiction of what happens when the warrant application is wholly lacking in probable cause.

B. The decision below is contrary to *Leon* and the cases it relied on for lack of probable cause

Leon, 468 U.S. at 915, recognized this precise circumstance of lack of probable cause as an exception to its good faith exception:

> Third, reviewing courts will not defer to a warrant based on an affidavit that does not "provide the magistrate with a substantial basis for determining the existence of probable cause." *Illinois v. Gates,* 462 U.S., at 239. "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." *Ibid.* See *Aguilar v. Texas,* supra, 378 U.S., at 114-115; *Giordenello v. United States,* 357 U.S. 480 (1958); *Nathanson v. United States,* 290 U.S.

> 41 (1933). Even if the warrant application was supported by more than a "bare bones" affidavit, a reviewing court may properly conclude that, notwithstanding the deference that magistrates deserve, the warrant was invalid because the magistrate's probable-cause determination reflected an improper analysis of the totality of the circumstances, *Illinois v. Gates,* supra, 462 U.S., at 238-239 . . . . (footnotes omitted)

As the Court states, this third exception to the good faith exception derived from settled law that there must be *facts* from which valid inferences (not mere hunches or speculation) may be drawn: *Nathanson v. United States,* 290 U.S. at 46-47 (facts must be shown that warrant the conclusion that contraband will be found); *Giordenello v. United States,* 357 U.S. at 486 (magistrate "should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime."); *Aguilar v. Texas,* 378 U.S. at 112-14 (police must show that their informant should be believed by showing facts and credibility of the informant); *Illinois v. Gates,* 462 U.S. at 239 (affidavit must show facts that will "provide the magistrate with a substantial basis for determining the existence of probable cause").

Thus, the decision of the court of appeals is contrary to these cases and *Leon.* Applying that settled law in the context of *Leon* has yet to done by this Court. This case presents a vehicle to do so.

C. The application for the warrant lacked probable cause, as the Arkansas Court of Appeals held, but that court found a case to find the search still reasonable, although unconstitutional.

Here, the magistrate accepted the officer's speculation and conclusion that there was probable cause to believe that

evidence would be found in petitioner's house based on his arrest and what was found in his car more than 22 miles away. The trial court summarily sustained the search after the suppression hearing.

The Arkansas Court of Appeals, however, concluded that the executing officers did not have, or provide probable cause to believe, that there was evidence to be found in petitioner's house. Nevertheless, the Court of Appeals held that the good faith exception saved the search because the Ninth Circuit had previously held such a search proper. *Sanders,* 76 Ark. App. at 113, 61 S.W.3d at 877-78 (App.A, *infra,* at 13a-14a), citing *Yancey v. State,* 345 Ark. 103, 44 S.W.3d 315 (2001), which relied on *United States v. Pitts,* 6 F.3d 1366 (9th Cir.1993). *Pitts* involved significantly different facts because Pitts was arrested for delivery of drugs, and not just possession of drugs, like petitioner.[2] The rationale that a dealer arrested for dealing might have drugs in his house does not carry over to one arrested in mere possession of a small quantity when there is no evidence of delivery.[3]

After the search occurred in this case but before the appeal was decided below, the Arkansas Supreme Court held in *Yancey v. State* that a less egregious search was unconstitutional, but the court sustained it under the good faith exception. Essentially, the Court of Appeals below followed the result of *Yancey:* The search was unconstitutional, but good faith saved it because the law was not well settled at the time

---

[2] *Pitts* quoted *United States v. Terry,* 911 F.2d 272, 273 (8th Cir.1990), and *United States v. Angulo-Lopez,* 791 F.3d 1394, 1399 (9th Cir.1986): "'[i]n the case of drug dealers, evidence is likely to be found where the dealers live.'" *Yancey* held that a similar search warrant was unconstitutional but saved by the good faith exception.

[3] If anything, the only inference was that Sanders was there to pick up drugs, not deliver them. This provided no probable cause to believe he had them at home so far away.

because there was a case somewhere that said that such a search was permissible.

D. Just how unconstitutional was it? Does it matter that this Court has not spoken to the precise issue?

1. This was not a close question on probable cause; the officers were on notice this search lacked probable cause.

The issue here should not even have been a close question for good faith exception purposes: There was not one iota of evidence found in petitioner's car supporting any conclusion that any evidence or contraband would be found in his house (the "nexus" requirement). To conclude that there was probable cause to search his house required the magistrate to accept the speculation and bare conclusions of someone "engaged in the often competitive enterprise of ferreting out crime." *Leon,* 468 U.S. at 914, quoting *United States v. Chadwick,* 433 U.S. 1, 9 (1977), quoting *Johnson v. United States,* 333 U.S. 10, 14 (1948). Great deference to a magistrate's determination is required; "[d]eference to the magistrate, however, is not boundless." *Leon,* 468 U.S. at 914. This case practically holds that it is.

This case underscores a nagging problem with some state courts: they often mechanically apply the good faith exception without fully explaining their rationale and without paying proper attention to the third exception of the good faith exception that an officer must still "provide the magistrate with a substantial basis for determining the existence of probable cause." *Gates,* 462 U.S. at 239, quoted in *Leon,* 468 U.S. at 915.

The Arkansas Court of Appeals held, as did the Arkansas Supreme Court in *Yancey,* that there clearly was no probable cause for a search of petitioner's house, but sustained this

probable cause-less search, anyway. Since the Fourth Amendment requires that "No Warrants shall issue, but upon probable cause," the state court sustained an unconstitutional search without adequately saying why, other than by reference to another case. But, under no stretch of probable cause did petitioner's possession in his car infer possession in the home 22 miles away.

2. The officers had fair warning that this search was unconstitutional.

This case also potentially allows the Court to explore the relation between the good faith exception and qualified immunity since the adoption of the good faith exception relied in part on the law of qualified immunity. *Leon,* 468 U.S. at 922-23 & n. 23, relying on *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). If the officer was on notice that his conduct was unconstitutional, is that enough to overcome the good faith exception? Many cases held this type of warrant unconstitutional, but a couple did not. So, the Arkansas courts latch on to the errant cases to say that the officers were not acting unreasonably. The cases of this Court reject that notion.

After *Leon,* this Court held in *Anderson v. Creighton,* 483 U.S. 635, 640 (1987) (*Bivens* action), and *United States v. Lanier,* 520 U.S. 259 (1997) (civil rights criminal prosecution), that a case exactly in point is not required for the Constitution to be violated—only that the officer have fair warning that his or her conduct is proscribed. Thus, "in the light of pre-existing law the unlawfulness [under the Constitution is] apparent. *Anderson, supra,* at 640. Where it is, the constitutional requirement of fair warning is satisfied." *Lanier,* 520 U.S. at 271-72 (bracketed material in original).

In this case, there was no reasonable inference that could be made that drugs or evidence would be found in petitioner's house. There was, therefore, no probable cause to believe that any evidence would be found in petitioner's house, and the

Fourth Amendment was violated. The officers were on notice and had fair warning.

The exclusionary rule should thus be applied.

3. The decision below also conflicts with *Malley v. Briggs*.

In *Malley v. Briggs,* 475 U.S. 335, 344-45 (1986), the Court applied *Leon* to hold that their same standard of objective reasonableness applied to qualified immunity determinations. "Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable, *Leon, supra,* at 923, will the shield of immunity be lost." The fact a magistrate signed the warrant was not defense to liability if the affidavit could not objectively and reasonably be relied upon.

> The analogous question in this case is whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant. If such was the case, the officer's application for a warrant was not objectively reasonable, because it created the unnecessary danger of an unlawful arrest.

Malley, 475 U.S. at 345. "We find it reasonable to require the officer applying for the warrant to minimize this danger by exercising reasonable professional judgment." *Id.* at 346. Thus, officers are expected to independently perform their duty, too, and they are to make a reasonable professional judgment as to probable cause first.

The mere fact a magistrate approved the warrant does not protect the officer from civil liability.

E. The action of the magistrate should not breathe life into this unconstitutional search warrant.

Leon and *Malley* make it clear that merely passing a defective warrant application through a magistrate does not automatically sanitize it and somehow imbue it with an aura of constitutionality that it otherwise lacked.

The officer prepares the affidavit, and he or she presents it to the magistrate for review. If the officer was reasonably aware of the lack of probable cause when drafting the affidavit, the mere fact that the magistrate signed off on it does not save the search under the good faith exception—more is required for the good faith exception to apply. *Leon,* 468 U.S. at 914-15. Thus, this case presents a fact situation similar to the one forecast in footnote 24 of *Leon,* 468 U.S. at 923:

> References to "officer" throughout this opinion should not be read too narrowly. It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination. Nothing in our opinion suggests, for example, that an officer could obtain a warrant on the basis of a "bare bones" affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search. See *Whiteley v. Warden,* 401 U.S. 560, 568 (1971).

II. APPLYING THE EXCLUSIONARY RULE TO THIS UNCONSTITUTIONAL SEARCH WILL SERVE THE DETERRENCE RATIONALE OF THE EXCLUSIONARY RULE.

Leon, Sheppard, and *Evans* require that the mistake be the officer's not the magistrate's for the exclusionary rule not to apply. *Malley* is in accord on qualified immunity, and, by extension, the good faith exception, and it requires the officer to exercise independent professional judgment to prevent the danger of unconstitutional police action.

Here, as usually happens, the officer collects the facts, prepares the application for the warrant, and submits the application to the magistrate for a determination of probable cause. Thus, the officer controls the facts presented to the magistrate.

This Court in *Leon* took pains to make it clear that its five exceptions, including a clearly inadequate showing of probable cause, as involved here, would not enable the prosecution to save an unconstitutional search with the good faith exception.

When a warrant application is as deficient as this one in showing probable cause that evidence would be found in the place to be searched, Sanders's house, and its lack of nexus to his car searched twenty-two miles away, the exclusionary rule should be applied to protect and serve the interests of the probable cause requirement of the Fourth Amendment.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JOHN WESLEY HALL, JR.*
KATHY L. HALL
523 West Third Street
Little Rock, AR 72201
(501) 371-9131
**Counsel of Record for Petitioner*

APPENDICES

Appendix A, *Sanders v. State,* 76 Ark. App. 104, 61 S.W.3d 871 (2001) 2a
Appendix B, *State of Arkansas v. Steve Sanders,* Newton County Circuit Court, No. CR99-48, Sept. 12, 2000 (filed Oct. 11, 2000) 19a
Appendix C, *Sanders v. State,* Ark.S.Ct., No. CR01-1425 (February 7, 2002), order denying petition for review 20a
Appendix D, *Sanders v. State,* Ark.Ct.App. No. CACR 01-262 (April 4, 2002), order recalling mandate pending petition for certiorari for 90 days 21a

APPENDIX A

Steven SANDERS *v.* STATE of Arkansas
CA CR 01-262
76 Ark. App. 104, 61 S.W.3d 871
Court of Appeals of Arkansas
Division I
Opinion delivered December 5, 2001*

1. Evidence – sufficiency of – test for determining. – The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial.

2. Evidence – substantial evidence defined – evidence viewed in light most favorable to State. – Evidence is substantial if it is of sufficient force that it would compel a conclusion one way or the other without recourse to speculation and conjecture; in determining whether there is substantial evidence, the appellate court reviews the evidence in the light most favorable to the State.

3. Criminal law – use of drug paraphernalia – drug paraphernalia defined. – Arkansas Code Annotated section 5-64-403(c)(1) (Supp. 1999) provides in pertinent part that it is unlawful for any person to use drug paraphernalia to store, contain, or conceal a controlled substance; the term "drug paraphernalia" includes all equipment, products and materials of any kind that are used to store, contain, or conceal controlled substances; specifically included within the definition of drug paraphernalia are containers and other objects that are used in storing or concealing controlled

---

* Counsel's Note: These headnotes are provided by the Arkansas Supreme Court's Reporter of Decisions.

substances.

4. Criminal law – drug paraphernalia – relevant factors in determining whether object is drug paraphernalia. – Relevant factors in determining whether an object is drug paraphernalia include the proximity of the object to controlled substances, and the existence and scope of legitimate uses for the object in the community [Ark. Code Ann. § 5-64-101(v) (Repl. 1997)].

5. Constitutional law – term "drug paraphernalia" – not unconstitutionally vague. – The supreme court has held that the term "drug paraphernalia" is not unconstitutionally vague.

6. Evidence – possession of drug paraphernalia clear – guilty verdict supported by substantial evidence. – Where the appellant was in possession of a cigar case in which methamphetamine and marijuana were hidden, the jury could have concluded that the cigar case was used as a container to conceal controlled substances; such an object fit squarely within the statutory definition of drug paraphernalia; there was substantial evidence to support the guilty verdict.

7. Criminal procedure – approach of citizen pursuant to policeman's investigative law enforcement function – balancing test required. – The supreme court has interpreted Ark. R. Crim. P. 2.2 to provide that an officer may approach a citizen in much the same way a citizen may approach another citizen and request aid or information; however, the approach of a citizen pursuant to a policeman's investigative law enforcement function must be reasonable under the existent circumstances and requires a weighing of the government's interest for the intrusion against the individual's right to privacy and personal free-

dom; to be considered are the manner and intensity of the interference, the gravity of the crime involved, and the circumstances attending the encounter; an encounter under this rule is permissible only if the information or cooperation sought is in aid of an investigation or the prevention of a particular crime.

8. Criminal procedure – officers were executing search warrant at methamphetamine lab in remote area – under Rule 2.2 officers could approach appellant to ask for identification & to inquire about purpose of his visit. – Where the officers were executing a search warrant and had found evidence of illegal activity when appellant came onto the property, and the property was the scene of a clandestine methamphetamine lab located in a remote area, under the investigatory authority of Rule 2.2, it was permissible for the officers to approach the appellant to ask for identification and to inquire about the purpose of his visit.

9. Witnesses – conflicting testimony – resolved by trial judge. – Conflicts in testimony are for the trial judge to resolve, and the judge is not required to believe any witness's testimony, especially that of the accused, since he is the person most interested in the outcome of the proceedings.

10. Evidence – review of denial of motion to suppress – determination of trial court not clearly against preponderance of evidence. – In reviewing a trial court's denial of a motion to suppress, the appellate court makes an independent examination based on the totality of the circumstances and will reverse only if the ruling was clearly against the preponderance of the evidence; here the testimony on the subject of consent was conflicting, and the trial court's determination pertaining to the search of appellant's truck was not clearly against the preponderance of the evidence.

11. Search & seizure – issuance of warrant – requirements for affidavit. – Rule 13.1 of the Rules of Criminal Procedure sets out the requirements for the issuance of a search warrant; the rule requires the affidavit to recite facts and circumstances tending to show that such persons or things are in the places to be searched; the task of the magistrate who issues the warrant is simply to make a practical, common-sense decision whether, given all of the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

12. Search & seizure – issuance of warrant – totality of circumstances test. – The totality-of-the-circumstances test is applied in determining whether the magistrate had a substantial basis for concluding that probable cause existed to issue the warrant.

13. Search & seizure – issuance of warrant – evidence required. – For a search warrant to issue, either direct or circumstantial evidence must be provided to show that contraband or evidence of a crime is likely to be found in the place to be searched, and there must be a factual nexus between the evidence sought and the place to be searched.

14. Search & seizure – search authorized solely on evidence found in appellant's vehicle – warrant to search appellant's apartment was invalid. – Where the search of appellant's apartment was authorized solely on the evidence found in appellant's vehicle, and there was no evidence in the affidavit linking appellant's apartment with his distant possession of contraband, the warrant was invalid.

15. Search & seizure – officer's objective, good-faith reliance on facially valid warrant will avoid application of exclusionary rule – rationale. – In *United States v. Leon,*

468 U.S. 897 (1984), the Supreme Court established a good-faith exception to the exclusionary rule; the Court held that an officer's objective, good-faith reliance on a facially valid warrant will avoid the application of the exclusionary rule in the event that the magistrate's assessment of probable cause is found to be in error; this is because the exclusionary rule is designed to deter police misconduct rather than to punish errors of judges and magistrates.

16. Search & seizure – officers were acting in good faith on determination of probable cause made by magistrate – trial court did not err in denying motion to suppress. – Where the officers were acting in good faith on the determination of probable cause made by the magistrate when they searched appellant's apartment, the trial court did not err in denying the motion to suppress.

17. Appeal & error – argument made without authority or convincing argument – argument not considered. – The appellate court did not consider appellant's argument where he made it without citation to authority and without providing a convincing argument.

Appeal from Newton Circuit Court; Robert W. McCorkindale, Judge; affirmed.

Dale W. Finley, for appellant.
Mark Pryor, Att'y Gen., by: Valerie L. Kelly, Ass't Att'y Gen., for appellee.

JOHN E. JENNINGS, Judge. Steven Sanders was found guilty by a Newton County jury of possession of drug paraphernalia, simultaneous possession of drugs and firearms, possession of methamphetamine, and possession of marijuana. He was sentenced to terms of three years in prison for possession of

drug paraphernalia and possession of methamphetamine to be served concurrently with a ten-year sentence for simultaneous possession of drugs and firearms. He was fined $500 for possession of marijuana. On appeal, he contends that there is insufficient evidence to support his conviction for possession of drug paraphernalia and that the trial court erred in denying his motion to suppress evidence seized in searches of his vehicle and apartment. We find no reversible error and affirm.

On August 31, 1999, officers working under the Fourteenth Judicial District Drug Task Force were executing a search warrant at the residence of Sam Freeman in Newton County. The Freeman property was located northeast of Jasper off a county road. The residence and a shop were in a wooded area and sat at the end of a two-hundred-yard driveway.

At noon, Investigator Greg Harris was searching in the woods about half-way up the driveway when he heard a vehicle coming onto the property. The search was at an advanced stage at that point, and numerous illegal items had been found, including a methamphetamine lab and a stolen vehicle. By the sound of the approaching vehicle, Officer Harris did not believe it to be a police car, and he thought perhaps that personnel from the crime lab had arrived. He dismissed that notion when he heard the vehicle drive up to the residence, stop, and then head back out of the driveway to leave. Officer Harris walked toward the driveway and saw a pickup truck that was being driven by appellant. Harris said that the window was down and that he yelled to appellant to stop. Harris identified himself and asked appellant who he was and why he was there. Appellant told him that he was looking to find a transfer case for his truck. Harris asked appellant why he thought he could find a truck part there, and appellant said that someone had told him that he could. Appellant could not remember who had told him that, however. Harris then asked appellant if he knew who lived there. Appellant replied that he did not know who lived there and that he had not been there before. Harris then asked him how he had found the place, and appellant said that he had

been told that the place to find truck parts was in Jasper.

Officer Harris testified that, under the circumstances, appellant's account did not ring true. He considered that the property was not in Jasper but in an out-of-the-way location where there were no signs for guidance and that this was the scene of a methamphetamine lab. Harris said that he asked appellant if there were any drugs or weapons in the truck. Appellant said that there were none. Harris testified that he asked appellant if he had a problem with him checking and that appellant gave him permission to search the truck.

Investigator David Small testified that he overheard appellant consent to a search of the truck. In the search, he found a gray box under the driver's seat that contained a handgun. A cigar case was found on the front seat under either a towel or a piece of clothing. The cigar case contained an eighth of one ounce of marijuana and four grams of methamphetamine. Appellant was then placed under arrest.

Paul Woodruff, an officer with the Harrison Police Department, applied for and obtained a search warrant for appellant's apartment in Harrison. In the course of that search, officers found on the kitchen counter a receipt from Wal-Mart that listed the purchase of a cigar case.

Appellant testified at the suppression hearing that he had been having trouble with the transfer case on the front differential of his truck and that he had gone to the Freeman property to find the part he needed. He said that he did not know Mr. Freeman, but that he knew Freeman had a salvage yard and that he did mechanic work. Appellant testified that he drove to the shop where he met Officer Gary Jenkins, and he said that he asked Jenkins if this was the Freeman place, since he had not been there before. Appellant said that Jenkins told him that it was Freeman's property but that Freeman was in jail. Appellant said Jenkins let him go but that he was stopped by Officer Darin Spears as he was backing out to leave. Appellant said that Spears also let him go after confirming with Officer Jenkins that Jenkins had already spoken to him. Appellant testified

that Officer Harris then stopped him on the driveway and said, "Did you think that you'd leave without being searched when there's been two meth labs discovered?" Appellant said that Harris immediately ordered him out of the truck and told him that a warrant was not needed for him to search the truck. Appellant stated that Harris asked him if he was going to give them a hard time about the search. Appellant testified that he did not consent to a search of his truck, but that he only agreed that he would not give them a hard time.

Officer Harris testified in rebuttal that he did not tell appellant that he was going to search the truck or that a warrant was not necessary for him to do so.

Appellant's drug-paraphernalia conviction was based on his possession of the cigar case that contained marijuana and methamphetamine. Appellant argues that there is insufficient evidence to support this conviction because it is unreasonable to interpret the statute so broadly as to criminalize his possession of that object. We disagree.

The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Ferguson v. State,* 343 Ark. 159, 33 S.W.3d 115 (2000). Evidence is substantial if it is of sufficient force that it would compel a conclusion one way or the other without recourse to speculation and conjecture. *Rose v. State,* 72 Ark. App. 175, 35 S.W.3d 365 (2000). In determining whether there is substantial evidence, we review the evidence in the light most favorable to the State. *Hale v. State,* 34 Ark. 62, 31 S.W.3d 850 (2000).

Arkansas Code Annotated section 5-64-403(c)(1) (Supp. 1999) provides in pertinent part that it is unlawful for any person to use drug paraphernalia to store, contain, or conceal a controlled substance. The term "drug paraphernalia" includes all equipment, products and materials of any kind which are used to store, contain, or conceal controlled substances. Ark. Code Ann. § 5-64-101(v) (Repl. 1997). Specifically included within the definition of drug paraphernalia are containers and

other objects that are used in storing or concealing controlled substances. Ark. Code Ann. § 5-64-101(v)(10) (Repl. 1997). Relevant factors in determining whether an object is drug paraphernalia include the proximity of the object to controlled substances, and the existence and scope of legitimate uses for the object in the community. Ark. Code Ann. § 5-64-101(v) (Repl. 1997).

The supreme court has held that the term "drug paraphernalia" is not unconstitutionally vague. *Moore v. State,* 297 Ark. 296, 761 S.W.2d 894 (1988); *see also Crail v. State,* 309 Ark. 120, 827 S.W.2d 157 (1992). The court has also ruled that there was sufficient evidence to support a conviction for this offense where the appellant was in possession of a vial that contained cocaine residue. *Edwards v. State,* 300 Ark. 4, 775 S.W.2d 900 (1989). *See also, e.g., Ramey v. State,* 42 Ark. App. 242, 857 S.W.2d 828 (1993).

Here, the appellant was in possession of a cigar case in which methamphetamine and marijuana were hidden. The jury could conclude that the case was used as a container to conceal controlled substances. Such an object fits squarely within the statutory definition of drug paraphernalia. We cannot say there is no substantial evidence to support the guilty verdict.

Appellant next argues that the trial court erred by not suppressing the evidence found in his vehicle. He contends that the stop of his vehicle was not justified under either Rule 3.1 or 2.2 of the Rules of Criminal Procedure. We hold that the encounter was authorized under Rule 2.2.

Rule 2.2(a) provides:

> A law enforcement officer may request any person to furnish information or otherwise cooperate in the investigation or prevention of crime. The officer may request the person to respond to questions, to appear at a police station, or to comply with any other reason able request.

The supreme court has interpreted Rule 2.2 to provide that an officer may approach a citizen in much the same way a citizen may approach another citizen and request aid or information. *State v. McFadden,* 327 Ark. 16, 938 S.W.2d 797 (1997). However, the approach of a citizen pursuant to a policeman's investigative law enforcement function must be reasonable under the existent circumstances and requires a weighing of the government's interest for the intrusion against the individual's right to privacy and personal freedom. *Baxter v. State,* 274 Ark. 539, 626 S.W.2d 935 (1982). To be considered are the manner and intensity of the interference, the gravity of the crime involved, and the circumstances attending the encounter. *Id.* The court has clarified that an encounter under this rule is permissible only if the information or cooperation sought is in aid of an investigation or the prevention of a particular crime. *Stewart v. State,* 332 Ark. 138, 964 S.W.2d 793 (1998).

For example, in *Baxter v. State, supra,* an officer stopped the appellant's vehicle in a park that was near a jewelry store that had just been robbed to ask if anyone had been seen in the park. As it turned out, the vehicle was occupied by the robbers. The supreme court held that the encounter was permissible under Rule 2.2 because the officer was seeking assistance in the investigation of a particular crime. *See also, Blevins v. State,* 310 Ark. 538, 837 S.W.2d 879 (1992). *In Bernal v. State,* 48 Ark. App. 175, 892 S.W.2d 537 (1995), a narcotics dog indicated that two suitcases on a bus contained drugs. The officer approached the appellant after he had exited the bus and asked appellant for identification. We held that Rule 2.2 authorized the officer to approach the appellant in the course of investigating the drug-related crime. By contrast, in *Meadows v. State,* 269 Ark. 380, 602 S.W.2d 636 (1980), officers approached the appellant at an airport because he and a companion were looking back and had quickened their pace as they were followed by the officers in the terminal. The court held that the encounter was not justified under Rule 2.2 because the officers were not investigating any particular crime.

In the case at bar, the officers were executing a search warrant and had found evidence of illegal activity when appellant came onto the property. It was the scene of a clandestine methamphetamine lab located in a remote area. Under the investigatory authority of Rule 2.2, it was permissible for the officers to approach the appellant to ask for identification and to inquire about the purpose of his visit.

Appellant further argues that the trial court erred in finding that he consented to the search of his truck. The testimony on this subject was conflicting, as the officers testified that appellant gave his consent while appellant testified that he did not. Conflicts in testimony are for the trial judge to resolve, and the judge was not required to believe any witness's testimony, especially that of the accused, since he is the person most interested in the outcome of the proceedings. *Tabor v. State,* 333 Ark. 429, 971 S.W.2d 227 (1998).

In reviewing a trial court's denial of a motion to suppress, the appellate court makes an independent examination based on the totality of the circumstances and will reverse only if the ruling was clearly against the preponderance of the evidence. *Hadl v. State,* 74 Ark. App. 113, 47 S.W.3d 897 (2001). We cannot say that the trial court's decision pertaining to the search of appellant's truck is clearly against the preponderance of the evidence.

Appellant's third argument is that there was no probable cause for the issuance of a warrant to search his apartment. The warrant was obtained based on the affidavit of Officer Woodruff and was predicated on the discovery of the weapon and drugs found in appellant's truck.

Rule 13.1 of the Rules of Criminal Procedure sets out the requirements for the issuance of a search warrant. The rule requires the affidavit to recite facts and circumstances tending to show that such persons or things are in the places to be searched. The task of the magistrate who issues the warrant is simply to make a practical, common-sense decision whether, given all of the circumstances set forth in the affidavit, there is

a fair probability that contraband or evidence of a crime will be found in a particular place. *Illinois v. Gates,* 462 U.S. 213 (1983). We apply the totality-of-the-circumstances test in determining whether the magistrate had a substantial basis for concluding that probable cause existed to issue the warrant. *Stephenson v. State,* 71 Ark. App. 254, 29 S.W.3d 744 (2000).

In *Yancey v. State,* 345 Ark. 103, 44 S.W.3d 315 (2001), the appellant and a man named Lee Cloud were seen tending marijuana plants in a wooded area six miles from Cloud's residence. After watering the plants, the men drove to Cloud's house. Search warrants for both men's homes were issued based on these observed events. The appellant argued on appeal that those facts did not establish probable cause for the search of his home. The supreme court held that, for a search warrant to issue, either direct or circumstantial evidence must be provided to show that contraband or evidence of a crime is likely to be found in the place to be searched and that there must be a factual nexus between the evidence sought and the place to be searched. The court ruled that probable cause was lacking because there was no evidence to suggest that the homes were in any way associated with criminal activity.

The court's holding in *Yancey* applies here. The search of appellant's apartment was authorized solely on the evidence found in appellant's vehicle. There was no evidence in the affidavit linking appellant's apartment with his distant possession of contraband. Therefore, we must conclude that the warrant was invalid.

Nevertheless, we affirm the trial court's denial of the motion to suppress. The court in *Yancey* concluded that suppression was not warranted based on the good-faith exception to the exclusionary rule established in *United States v. Leon,* 468 U.S. 897 (1984). In *Leon,* the Court held that an officer's objective, good-faith reliance on a facially valid warrant will avoid the application of the exclusionary rule in the event that the magistrate's assessment of probable cause is found to be in error. This is because the exclusionary rule is designed to deter

police misconduct rather than to punish errors of judges and magistrates. *Herrington v. State,* 287 Ark. 228, 697 S.W.2d 899 (1985). In applying the exception, the *Yancey* court noted that courts in other jurisdictions were divided over the issue of probable cause under similar facts and that the officers were acting in good faith on the determination of probable cause made by the magistrate. We reach the same conclusion here and hold that the trial court did not err in denying the motion to suppress.

Appellant further contends that the warrant was defective because it authorized the officers to search for "stolen property," the "fruits of any crime," and numerous items that he contends are unconnected to a search for controlled substances. Appellant concedes that courts have generally held that the inclusion of such broad language does not invalidate a warrant, but he argues that this language renders the search unreasonable from its inception. Appellant has cited no authority to support this proposition nor does he provide a convincing argument. For this reason, we need consider the issue no further. *Bunch v. State,* 344 Ark. 730, 43 S.W.3d 132 (2001).

Affirmed.

BIRD, J., agrees.

ROAF, J., concurs.

ANDREE LAYTON ROAF, Judge, concurring. I reluctantly concur in affirming Steven Sanders' conviction for possession of drug paraphernalia, a felony for which he received a three-year sentence in addition to the ten-year sentence he received for possession of the contraband that was found inside the cigar case. The relevant statutory provision, Ark. Code Ann. § 5-64-101(v)(10), defines drug paraphernalia as follows:

> The term "drug paraphernalia" means all equipment, products and materials of any kind which are used, . . . in . . . storing, containing, concealing, . . . a controlled substance. . . . It includes, but is not limited to:

. . .

> Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances;

A cigar case is certainly a "product" or "material" and is a "container or other object." In this instance, Sanders used it to hold his drugs, and, while it may be argued that he was not "storing" or "concealing" the drugs, the case certainly contained the drugs as provided in § 101 (v).

Sanders argues that the evidence is insufficient to support his conviction for simply possessing the cigar case because it is a container that has no special relation to or adaptation for use with controlled substances. He contends that the drug paraphernalia statute, Ark. Code Ann. § 5-64-403 (1999), has been given an "unreasonable interpretation" not intended by our legislature in this instance. Sanders points out and, unfortunately, he is correct, that such an interpretation would likewise support a felony conviction for such an item as a paper bag, an envelope, a baseball cap, a cigarette package, or even a pants pocket.[1] Sanders's argument makes good common sense, how

---

[1] Webster's New Twentieth Unabridged Dictionary defines "paraphernalia" as

> 1. personal belongings;
> 2. Any *collection of articles* usually used in some activity; equipment, apparatus; trappings; gear.

However, Ark. Code Ann. § 1-2-203(b) (Repl. 1996), a general provision of statutory construction applicable to all cases, civil and criminal, provides that "[w]henever, in any statute, words importing the plural number are used in describing or referring to any matter, parties, or persons, any single matter, party, or person shall be deemed to be included although distributive words may not be used," consequently, a conviction for possession of a single item of

ever, that is not the kind of authority that this court can employ. Moreover, Sanders acknowledges that our supreme court has held that this statute is not unconstitutionally vague, *see Moore v. State,* 297 Ark. 296, 761 S.W.2d 894 (1988), *Edwards v. State,* 300 Ark. 4, 775 S.W.2d 900 (1989), *Crail v. State,* 309 Ark. 120, 827 S.W.2d 157 (1992), as has the Eighth Circuit court of appeals in *Garner v. Whitt,* 726 F.2d 1274 (8th Cir. 1984), albeit under different facts.

Even so, there is support for Sanders's argument in both Arkansas case law and cases from other jurisdictions. In *Dickerson v. State,* 324 Md. 163, 596 A.2d 648 (1991), the Maryland Court of Appeals held that the appellant could be convicted only of possession of cocaine with intent to distribute and not also of use of drug paraphernalia, where both convictions were based on possession of a single vial of cocaine. The Maryland drug paraphernalia statute provided in a section almost identical to Arkansas's that, "[i]t is unlawful for any person to use drug paraphernalia to . . . store, contain or conceal a controlled dangerous substance . . ." and contained a definitions section likewise identical to ours. The Maryland court found persuasive the appellant's argument that the Legislature did not intend to permit dual convictions where the drug paraphernalia conviction is premised solely on the use of a container in which the contraband forming the basis for the drug offense is found.

In Arkansas, there are many cases, too numerous to list, involving a conviction for possession of multiple drug-related items, or "paraphernalia," and where drugs and paraphernalia items were also found in a "box" or "bag" or other similar, otherwise innocuous container. While these cases are numerous, it is significant that I have not found any of these cases to include, directly or by inference, the box or bag within para-

---

paraphernalia does not run afoul of the mandate that criminal statutes be strictly construed in favor of an accused.

phernalia enumerated or addressed in the court's analysis. *See e.g., Hughes v. State,* 74 Ark. App. 126 (2001) (trash bags in which paraphernalia was found not discussed in analysis); *Thompson v. State,* 333 Ark. 92, 966 S.W.2d 901 (1998) (eyeglass case not analyzed as drug paraphernalia); *White v. State,* 47 Ark. App. 127, 886 S.W.2d 876 (1994) (Crown Royal bag containing drugs not discussed in sufficiency analysis); *Bond v. State,* 45 Ark. App. 177, 873 S.W.2d 569 (1994) (pipe as paraphernalia, but paper bag marijuana found in not discussed).

However, there are at least two Arkansas cases in which a paraphernalia conviction was based on possession of a single item. In *Edwards v. State, supra,* the supreme court found that a small vial containing cocaine residue was sufficient evidence to support the conviction because the statute specifically included "cocaine vials." *See* Ark. Code Ann. § 5-64-101(v)(12)(F). In *Crail v. State, supra,* the appellant's felony conviction was based on his possession of a small white pipe that was found to have been used to smoke marijuana, while he received only a misdemeanor conviction for the marijuana he possessed. However, Crail's appeal of the paraphernalia conviction was based on an equal protection and void-for-vagueness challenge to the paraphernalia statute. Pipes are also specifically listed as paraphernalia in § 101(v)(12)(A), and it can be argued that these two cases are therefore distinguishable because they involve items bearing a special relation to the use of contraband, however, this is an argument that would best be addressed to our supreme court.

Even a dog gets one bite; surely even a miscreant such as Mr. Sanders should get one paper sack, or, in this instance, one cigar case to carry his drugs around in without being twice made a felon for it. However, it is for the Legislature to make the criminal laws, and the prosecutor to employ his very broad power and discretion to determine when and if a charge is to be brought. We can be at least relieved that we have not yet seen the conviction based on possession of a paper sack that Sanders warns of. Perhaps our supreme court would revisit the constitu-

tionality of the paraphernalia statute if that occurs. Until then, because this court lacks the discretion of a legislature or a prosecutor, or the ability to overturn supreme court precedent, I must agree to affirm this conviction.

APPENDIX B

State of Arkansas v. Steve Sanders, Newton County Circuit Court, No. CR99-47, Sept. 12, 2000 (T. 266-67):

The court reiterates that it is denying the motions to suppress in their entirety.

Written order filed Oct. 11, 2000 (T.61):

The Court finds that Mr. Sanders appears at the scene when a search warrant was being executed in connection with the manufacture of methamphetamine. Officer Harris was justified in stopping Mr. Sanders and inquiring as to the reasons he was on the premises. Mr. Sanders then consented to a search of his vehicle.

APPENDIX C

CR01-1425 February 7, 2002

Steve Sanders v. State of Arkansas

Petition for review denied.

APPENDIX D

CACR01-262 April 4, 2002

Steven Sanders v. State of Arkansas, from Newton Circuit.

Appellant's motion for stay of mandate in order to petition for writ of certiorari granted. 90 days. [shown on court's syllabus on April 11, 2002]